Supreme Court, U.S.
FILED
NOV 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-528

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

VENTILATOREN STORK HENGELO B.V. AND VERENIGDE MACHINEFABRIEKEN STORK N.V.,
Petitioners,

VS.

FORSIKRINGSAKTIESELSKABET HAFNIA,
aka HAFNIA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRIANE NELSON MITCHELL
PAUL, HASTINGS, JANOFSKY & WALKER
1299 Ocean Avenue, Fifth Floor
Santa Monica, California 90401
(213) 319-3300
Counsel of Record for Petitioners

ROGER E. PODESTA
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Bowne of Los Angeles, Inc., Law Printers. (213) 627-2200.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. A WRIT SHOULD BE ISSUED TO PERMIT THE APPEAL OF THE DISTRICT COURT'S DECISION ON THE ARBITRATION QUESTION	5
II. A WRIT SHOULD BE ISSUED BECAUSE THE RULE 38 AWARD WILL DISCOURAGE ACCESS TO THE APPELLATE PROCESS	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

	Page
Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp., 677 F.2d 771 (9th Cir. 1982)	3
Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983)	3, 4
Good Shot v. United States, 179 U.S. 87, 21 S.Ct. 33, 45 L.Ed. 101 (1900)	2
Lumbermens Mutual Casualty Co. v. Borden Co., 268 F.Supp. 303 (S.D.N.Y. 1967)	3
Matson Navigation Co. v. Stal-Laval Turbin AB, 609 F.Supp. 579 (N.D. Cal. 1985)	4
Nixon v. Fitzgerald, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982)	2, 3
Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984) ..	7
United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)	2
Waco v. United States Fidelity & Guaranty Co., 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934)	6, 7, 8

TABLE OF AUTHORITIES

Statutes

	Page
9 U.S.C. Section 1	9
9 U.S.C. Section 15	6, 8, 9
9 U.S.C. Section 201	9
9 U.S.C. Section 202	7
9 U.S.C. Section 203	7
9 U.S.C. Section 205	6, 7, 9
28 U.S.C. Section 1447	6, 9

Rules

Federal Rules of Appellate Procedure, Rule 34	8
Federal Rules of Appellate Procedure, Rule 38	5, 9
Supreme Court Rules, Rule 29	1

No. 90-528

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

VENTILATOREN STORK HENGELO B.V. AND
VERENIGDE MACHINEFABRIEKEN STORK N.V.,
Petitioners,

VS.

FORSIKRINGSAKTIESELSKABET HAFNIA,
aka HAFNIA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, Ventilatoren Stork Hengelo B.V. ("Ventilatoren") and Verenigde Machinefabrieken Stork N.V. ("Machinefabrieken"), filed a Petition for Writ of Certiorari on September 24, 1990.[1] In response, Respondent, Forsikringsaktieselskabet Hafnia ("Hafnia") filed a document entitled Brief in Opposition to Petition for Writ of Certiorari and Request for Sanctions ("Op. Cert."). In its Opposition Brief, Hafnia does not challenge the basic grounds which support issuance of a writ including (1) the important federal policies favoring the right to

[1]The Petition included a list of the nonwholly-owned subsidiaries of petitioners as required by Supreme Court Rule 29.1.

arbitration — especially the right to arbitration in international commercial transactions, and (2) the fundamental right to seek access to the judicial process which includes the right to seek appellate review. Rather than addressing the merits of the Petition, Hafnia makes several assertions and arguments which attempt to confuse the questions raised by petitioners. This Reply Brief will address the errors and misstatements which are contained in Hafnia's Opposition Brief.

JURISDICTIONAL STATEMENT

Hafnia has claimed that the Court does not have jurisdiction to hear this appeal, citing *Good Shot v. United States*, 179 U.S. 87, 21 S.Ct. 33, 45 L.Ed. 101 (1900), for the proposition that jurisdiction is lacking because the case was not "in the Court of Appeals". (Op. Cert. at 1.) This argument is without merit. *Good Shot* does not establish that any decision by the court of appeals holding that the federal courts lack jurisdiction over an issue is beyond the certiorari authority of the Court. The correct rule is that the Court's certiorari jurisdiction is plenary, and that, so long as an appeal is "timely filed and all other procedural requirements" are met, the Court has jurisdiction to review the case. *United States v. Nixon,* 418 U.S. 683, 690, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). As the Court has explained:

> "There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction — a power we have exercised routinely. If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court." (citation omitted)

Nixon v. Fitzgerald, 457 U.S. 731, 743 n. 23, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982).

STATEMENT OF THE CASE

Hafnia has agreed with most of the key facts in the Petition. However, in its Opposition Brief, Hafnia made the statement that none of its four causes of action rely upon the contract that contained the arbitration clause. (Op. Cert. at 4.) Hafnia's statement is not true. The central allegation to all four causes of action is that the windmill blades were defectively designed and manufactured. In its complaint, Hafnia has admitted that the windmill blades were "designed and manufactured pursuant to [Ventilatoren's] contract with Nordtank". Ventilatoren's contract with Nordtank, of course, contained the arbitration clause at issue in the present case. In addition, Hafnia's express warranty cause of action specifically refers to the five-year warranty contained in the supply contract. Contrary to Hafnia's argument, arbitration clauses are routinely enforced against parties, such as Hafnia, which are proceeding as assignees or subrogees.[2]

---

[2]As one court explained:

> "[T]here is no valid basis in law or equity why an arbitration clause should not be enforced against a subrogee. To hold otherwise would seriously impair the validity of arbitration clauses since either party could escape the effect of such a clause once he has settled with his insurer."

Lumbermens Mutual Casualty Co. v. Borden Co., 268 F.Supp. 303, 314 (S.D.N.Y. 1967). *See Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp.*, 677 F.2d 771, 773 (9th Cir. 1982) (component part manufacturer "had no greater liabilities" and purchaser "had no greater rights" than those specified in supply contract); *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 204 (3d Cir. 1983), *cert.*

In the Petition, Ventilatoren and Machinefabrieken pointed out that, in a virtually identical case, the same arbitration agreement was held binding against parties who were in the same basic position as Hafnia. Hafnia has attempted to differentiate its lawsuit from this other case by claiming that Ventilatoren's motion to consolidate the two appeals "was denied". (Op. Cert. at 5.) Hafnia fails to mention that the Ninth Circuit saw sufficient similarity between the two cases to enter an order requiring that the two appeals be calendared and heard by the same three-judge panel.[3] Moreover, it is disingenuous for Hafnia to argue that there are "substantial differences between the cases and issues on appeal" (Op. Cert. at 5), when Hafnia knows that both cases arise from Nordtank's purchase of windmill blades from Ventilatoren and that both cases are covered by the exact same arbitration clause.[4]

---

denied, 464 U.S. 938 (1983) (purchaser from manufacturer was bound by forum selection clause in the component part manufacturer's supply contract with the manufacturer); *Matson Navigation Co. v. Stal-Laval Turbin AB*, 609 F.Supp. 579, 581 (N.D. Cal. 1985) (arbitration clause in component part manufacturer's contract was recognized).

[3]The order filed by the Ninth Circuit Court of Appeals on March 9, 1989, provided that:

> "Appellants' motion to consolidate appeal Nos. 88-15708 and 89-55145 is denied. However the clerk shall calendar these cases before the same panel.
>
> This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order."

Hafnia never sought reconsideration of the order calendaring the two cases together.

[4]Hafnia has also suggested that Nordtank may not have signed the agreement with the arbitration clause. (Op. Cert. at 3 n.1.) In the district court, Hafnia conceded that Nordtank was bound by the

REASONS FOR GRANTING THE WRIT

I.

A WRIT SHOULD BE ISSUED TO PERMIT THE APPEAL OF THE DISTRICT COURT'S DECISION ON THE ARBITRATION QUESTION

While Hafnia attempts to confuse the questions raised by the Petition, it does admit the crucial issue which supports the need for issuance of a writ of certiorari. Hafnia has conceded that the district court did decide that Hafnia was not bound by the arbitration agreement.[5] That question should be subject to appellate review. It should not make any difference whether the issue is decided in the context of a remand when there is a pending motion to compel arbitration. A party who has been denied the right to arbitration should be able to seek appellate review of the adverse ruling. Moreover, a party should not be penalized under Fed. R. App. P. 38 for attempting to seek appellate review.

Hafnia has argued that the Ninth Circuit's ruling was a matter of black letter law. (Op. Cert. at 7-9.) That is not true. No statutes or cases directly support the result

---

arbitration clause. As a result, there was no need to introduce Nordtank's signed acknowledgement in the district court.

[5]Hafnia made the following statement in its Opposition Brief:

> "Stork had the opportunity in opposing the remand motion to: (1) establish the existence of an arbitration agreement; and (2) establish that Hafnia was contractually bound by it. Stork failed on both counts."

(Op. Cert. at 13.) *See also* Op. Cert. at 4-5 ("[i]t is clear from the District Court's opinion that Stork did not meet its burden of establishing subject matter jurisdiction by proving that the dispute related to a written arbitration agreement between the parties to the litigation").

which was reached by the Ninth Circuit. Hafnia has not identified any cases which have held that the appealability bar of 28 U.S.C. § 1447(d) applies where the district court first determines the substantive issue that a party is not bound by an arbitration clause in a case which has been removed to federal court pursuant to Section 205 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Hafnia has not identified any cases which have held that the 28 U.S.C. § 1447(d) appealability bar applies where the effect of the district court's remand order was to deny an application to compel arbitration, the appealability of which is authorized by 9 U.S.C. § 15. Nor has Hafnia identified any cases which have held that the 28 U.S.C. § 1447(d) appealability bar applies where the district court's remand decision was "in logic and in fact" preceded by its substantive determination of the arbitration issue, which should have brought the matter within the rule of *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934). As was discussed in the Petition, each of these arguments supports the need for issuance of the writ.

Hafnia has attempted to create the misimpression that the district court's subject matter jurisdiction was dependent upon Ventilatoren's ability to prove that Hafnia had specifically agreed to a written arbitration agreement.[6] Hafnia's suggestion misstates the law. The Convention on

---

[6]*See* Op. Cert. at 4-5 ("[i]t is clear from the District Court's opinion that Stork did not meet its burden of establishing subject matter jurisdiction by proving that the dispute related to a written arbitration agreement between parties to the litigation"); Op. Cert. at 12 ("[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration a dispute which he has not agreed so to submit").

the Recognition and Enforcement of Foreign Arbitral Awards provides that removal to federal court is proper "[w]here the subject matter of an action or proceeding pending in State court *relates to an arbitration agreement* or award falling under the Convention. . . ." 9 U.S.C. § 205 (emphasis added).[7] In the present case, Hafnia has not and cannot dispute the fact that its lawsuit is related to the arbitration agreement in Ventilatoren's supply contract for the windmill blades.

The fact that the district court ignored the jurisdictional test (i.e., whether the subject matter of a dispute *relates* to an arbitration agreement) and made the substantive determination that Hafnia was not bound by the arbitration clause supports the need for appellate review.[8]

---

[7]Jurisdiction under the Convention for the Recognition and Enforcement of Foreign Arbitral Awards is not dependent upon a finding that both parties agreed to be bound by an arbitration clause. According to 9 U.S.C. § 202, "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title, falls under the Convention." And, pursuant to 9 U.S.C. § 203: "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy."

[8]Under *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 143, 55 S.Ct. 6, 79 L.Ed. 244 (1934), where a substantive determination "in logic and in fact . . . precede[s] that of remand", the order is reviewable. *See also Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 277 (9th Cir. 1984) (remand order was appealable, since "[t]o hold otherwise would deprive Budco of its right to appeal a substantive determination of contract law. We cannot believe that Congress intended to immunize such decisions from review").

This is particularly true where, as with 9 U.S.C. § 15, Congress has expressly and specifically authorized appellate review of any order which denies an application to compel arbitration.

II.

A WRIT SHOULD BE ISSUED BECAUSE THE RULE 38 AWARD WILL DISCOURAGE ACCESS TO THE APPELLATE PROCESS

Contrary to Hafnia's arguments (Op. Cert. at 13-15), there was no basis for the award of sanctions: (1) the law was not clear and unambiguous; (2) one panel of the Ninth Circuit found sufficient merit to the jurisdictional arguments that it refused to decide Hafnia's motion to dismiss and referred the question to the panel which considered the case on the merits; (3) the panel which heard the appeal proceeded with oral argument rather than cancelling it pursuant to Fed. R. App. P. 34(a); and (4) the panel which awarded sanctions refused to address several of the arguments that supported appellate jurisdiction (e.g., the arguments based on 9 U.S.C. § 15, *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934), and the federal policies favoring arbitration).

In its Opposition Brief, Hafnia has made another request for sanctions. (Op. Cert. at 15-16.) Hafnia argues that petitioners should be punished for attempting to protect their right to arbitration by filing a Petition for Writ of Certiorari. Because the Court has jurisdiction to hear this Petition, and because there are substantial reasons why the writ should be issued, the request for sanctions is insupportable. Hafnia's request for sanctions further illustrates the need to grant certiorari in the present case. Sanctions, and requests for them, should

not be used to chill or discourage access to the courts or the appellate process. The present case raises important questions relating to the important federal right to arbitration, a right that has been secured and reaffirmed by statute (9 U.S.C. § 1, *et seq.*), numerous decisions of this Court, and the Convention (9 U.S.C. § 201, *et seq.*) which has been adopted in this country as well as Denmark and The Netherlands. The Court should reject Hafnia's position advocating punishment of legitimate efforts to obtain appellate review.

CONCLUSION

A writ of certiorari should be issued to address the important question of whether the 28 U.S.C. § 1447(d) bar on the appellate consideration of remand orders is applicable where: (1) the district court first determines the substantive issue of whether the parties are bound by an arbitration agreement in a case which was removed under 9 U.S.C. § 205; (2) the effect of the district court's order was to deny an application to compel arbitration, the appealability of which is expressly authorized by 9 U.S.C. § 15; (3) the district court's decision directing remand was preceded "in logic and in fact" by its determination of the arbitrability of the controversy; (4) the district court's decision is inconsistent with this Court's interpretation of the important federal policies favoring the right to arbitration — especially the right to arbitration in international commercial transactions; and (5) several courts of appeals have recognized an exception to 28 U.S.C. § 1447(d) in cases involving forum selection clauses. In addition, a writ of certiorari should be issued to address the important question of whether Fed. R. App. P. 38 sanctions should be used by the courts of appeals to discourage litigants from seeking appellate

review of district court orders which effectively deny the right to arbitration.

Respectfully Submitted,

BRIANE NELSON MITCHELL
PAUL, HASTINGS, JANOFSKY & WALKER
1299 Ocean Avenue, Fifth Floor
Santa Monica, California 90401
(213) 319-3300
Counsel of Record for Petitioners

ROGER E. PODESTA
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

DATED: November 2, 1990.